(3)

No. 90-368

In the Supreme Court of the United States

OCTOBER TERM, 1990

SHELDON BARUCH TOIBB, PETITIONER

v.

STUART J. RADLOFF

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT SUPPORTING PETITIONER

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

STEPHEN J. MARZEN
Assistant to the Solicitor General

WILLIAM KANTER
BRUCE G. FORREST
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MARTHA DAVIS
General Counsel

PATRICK TINKER
Attorney
Executive Office for United States Trustees
Washington, D.C. 20534

QUESTION PRESENTED

Whether a debtor must be engaged in an ongoing business in order to seek reorganization relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-368

SHELDON BARUCH TOIBB, PETITIONER

v.

STUART J. RADLOFF

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT SUPPORTING PETITIONER

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A2-A6, is reported at 902 F.2d 14. The opinions of the district court, Pet. App. A9-A16, and the bankruptcy court, Pet. App. A19-A28, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1990. A petition for rehearing was denied on June 8, 1990. Pet. App. A7. The petition for a writ of certiorari was filed on August 2, 1990, and was granted on January 22, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 109 of the Bankruptcy Code (11 U.S.C.) provides in pertinent part as follows:

> Who may be a debtor
>
> * * * * *
>
> (b) A person may be a debtor under chapter 7 of this title only if such person is not—
>
> (1) a railroad;
>
> (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); or
>
> (3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.
>
> * * * * *
>
> (d) Only a person that may be a debtor under chapter 7 of this title, except a stockholder or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.

STATEMENT

The Bankruptcy Code offers debtors different remedies under its different Chapters. Most debtors qualify for relief under more than one Chapter. The debtor's choice of a particular Chapter is determined by the cost of proceedings under it and the remedies it provides.

In this case, petitioner—an individual debtor—sought to reorganize under Chapter 11. The bankruptcy court dismissed his petition on the authority of *Wamsganz* v. *Boatmen's Bank of De Soto*, 804 F.2d 503, 505 (8th Cir. 1986), which held that "persons who are not engaged in business may not seek relief under Chapter 11 of the Bankruptcy Code." The district court and the court of appeals affirmed the dismissal on the same basis.

1. Beginning in March 1983, petitioner was employed as a consultant by the Independence Electric Corporation (IEC), a company formed in 1983 to produce and market electric power. IEC terminated petitioner's consulting agreement in April 1985. Between April 1985 and September 1986, petitioner sought other consulting work related to the energy industry, with little success. He subsisted primarily on money from his parents and friends and from payments related to his previous consulting work at IEC. In July 1986, petitioner moved to St. Louis, Missouri. On November 18, 1986, he filed a voluntary Chapter 7 (liquidation) petition in the United States Bankruptcy Court for the Eastern District of Missouri. Pet. App. A19-A22.

In connection with his Chapter 7 petition, petitioner filed standard schedules of assets and liabilities. As liabilities, petitioner identified a disputed federal tax priority claim of $11,000 and unsecured claims of $170,605. Schedules of Assets and Liabilities, Schedule A-1 and A-3 (Oct. 30, 1986). As assets, petitioner listed 400 shares of IEC stock and a "possible claim against business associates for breach of duty," both having a value "unknown." *Id.*, Schedule B-2. Otherwise, petitioner presented what bankruptcy practitioners refer to as a "no asset" case—*i.e.*, a case in which the debtor has no assets worth

liquidating.[1] Petitioner listed no income from employment; his Statement of Current Income and Expenditures (Oct. 30, 1986) indicated that his living expenses (estimated at $661 per month) were paid for by a "loan from parents."

On August 6, 1987, the Chapter 7 trustee, respondent Stuart J. Radloff, notified the creditors and other parties in interest that he had received an offer of $25,000 for petitioner's IEC stock from IEC's Board of Directors. J.A. 13-14. On August 25, 1987, the law firm of Dickstein, Shapiro & Morin, a scheduled creditor, objected to the sale on the ground that the offer was not lawfully tendered because it was "not made by a Board of Directors of IEC legally constituted." Objection to Sale of Debtor's Stockholdings in Independence Electric Corporation at 1. The creditor also objected that, "in light of imminent events which will significantly affect the value of the corporation's shares, the offer is premature and the amount offered woefully inadequate." *Ibid.*

2. On September 21, 1987, petitioner filed a motion to convert to Chapter 11 (reorganization) pursuant to 11 U.S.C. 706(a), J.A. 15-16, and objected to the trustee's proposed stock sale, *id.* at 17-20. Petitioner explained that, at the time he filed for relief under Chapter 7, he believed the IEC stock to be worthless. *Id.* at 18. After he filed his Chapter 7 petition, however, IEC was granted an exclusive license to develop hydroelectric power by the Federal

[1] Petitioner also listed assets of $20 cash, furniture valued at $100, clothing and other personal possessions valued at $250, and a used car worth $1000. Schedule of Assets and Liabilities, Schedule B-2 (Oct. 30, 1986). Except for petitioner's $500 equity in the used car, those items were excluded from the property of the estate by 11 U.S.C. 522 and Mo. Ann. Stat. § 513.430 (Vernon 1952 & Supp. 1990) J.A. 12.

Energy Regulatory Commission. *Ibid.* Although petitioner acknowledged that the IEC stock's value was still "highly speculative," he "now believes that IEC may have some value." *Ibid.* For that reason, petitioner "now believes that this case is an appropriate case for reorganization under Chapter 11" where "the debtor is entitled to deal with the assets * * * pursuant to a plan of reorganization." *Ibid.*

On October 2, 1987, the conversion was allowed, J.A. 21-23, and, on February 1, 1988, petitioner filed a Plan of Reorganization, *id.* at 70-82. In that Plan, petitioner proposed to pay 100% of all administrative, priority, and tax claims. *Id.* at 75-76. Petitioner offered to pay the remaining (unsecured) creditors $25,000, less the administrative, tax, and priority claims. *Id.* at 76; see *id.* at 77 (estimating those claims).[2] In addition, petitioner proposed to pay the unsecured creditors 50% of any dividends or other distributions from IEC, up to full payment of the debts, for six years. *Id.* at 76, 77-78. In a proposed Disclosure Statement, also filed on February 1, 1988, petitioner explained that the $25,000 would be obtained by means of an unsecured loan, to be repaid from debtor's personal income and his 50% interest in future IEC distributions under the proposed plan. *Id.* at 94. Petitioner explained that IEC had obtained several exclusive licenses from the Federal Energy Regulatory Commission to construct and operate hydroelectric projects. *Id.* at 96-97. Petitioner admitted that IEC had financial problems, and that its future was "uncertain." *Id.* at 97. But since the $25,000 distribution in petitioner's plan was equal to

[2] In the schedules filed with petitioner's Chapter 11 petition, the tax claim has been reduced to $4,200.63 and the total unsecured claims to $137,619.34. J.A. 64.

the offer the trustee received for the IEC stock, and since the reorganization plan promised the creditors 50% of future proceeds from that stock, "the Plan of Reorganization proposes a payout to creditors of an amount at least equal to what the creditors would receive in a liquidation with the possibility of a greater return if the IEC Stock earns a dividend or if [petitioner] sells the IEC Stock within the next 6 years." *Id.* at 99.

3. On March 8, 1988, the bankruptcy court *sua sponte* entered an order directing petitioner to show cause why his petition should not be dismissed for failure to qualify as a Chapter 11 debtor. After a hearing, the bankruptcy court found that petitioner was not engaged in an ongoing business [3] and, in view of the holding in *Wamsganz* v. *Boatmen's Bank*, 804 F.2d 503 (8th Cir. 1986) that Chapter 11 is limited to business debtors, dismissed the petition. Pet. App. A19, A24-A25, A27-A28.

4. On appeal, the district court found no basis to disturb the bankruptcy court's finding that petitioner "was not engaged in an ongoing business" and affirmed that court's dismissal of petitioner's case on the authority of *Wamsganz*. Pet. App. A16. In a brief *per curiam* opinion, the court of appeals likewise concluded that petitioner "did not qualify as a business entitled to Chapter 11 protection" and that "the Bankruptcy Court was controlled by *Wamsganz*." *Id.* at A5. The petition to rehear the case en banc was denied. *Id.* at A7.

[3] The bankruptcy court found that petitioner was not engaged as an energy consultant on the date he converted his Chapter 7 case to one under Chapter 11 or at any time thereafter. Pet. App. A25. Although petitioner also contended that he was engaged in the business of raising funds for nonprofit organizations, the bankruptcy court determined that petitioner's "fund raising endeavors comprise only a temporary occupation and do not constitute the 'business' which the Debtor is seeking to reorganize." *Ibid.* Petitioner does not seek further review of the question whether he is engaged in an ongoing business. Pet. 7 n.1.

SUMMARY OF ARGUMENT

The Bankruptcy Code defines with some precision the various categories of debtors eligible for relief under the different Chapters of the Code. With certain exceptions not relevant here, the Code specifies that "a person that may be a debtor under chapter 7 * * * may be a debtor under chapter 11." 11 U.S.C. 109(d). Chapter 7, in turn, specifies that "[a] person may be a debtor under chapter 7 * * * only if such person is not" one of a number of listed entities, such as an insurance company, bank, or savings and loan association. 11 U.S.C. 109(b). There is no dispute that petitioner is not one of the precluded entities listed in the statute. Since petitioner "may be a debtor under chapter 7," by the unambiguous language of the statute he also "may be a debtor under chapter 11." 11 U.S.C. 109(d).

The court below added another prerequisite to Chapter 11 relief not set forth in the statute, that the debtor be engaged in an ongoing business. The court, as it put it in a prior opinion, thought that "[t]he legislative history of the Bankruptcy Code, taken as a whole, shows Congress meant for chapter 11 to be available to businesses and persons engaged in business, and not to consumer debtors." *Wamsganz* v. *Boatmen's Bank of De Soto*, 804 F.2d 503, 505 (8th Cir. 1986). The court explained that "[t]he provisions of chapter 11 substantiate this reading of the legislative history." *Ibid.* This is exactly back-

wards. Courts should not seek the meaning of statutes in the legislative history, and then check to see if the actual provisions of the statute "substantiate" that reading. Proper analysis begins with the provisions of the statute, and where—as here—the statute is clear and unambiguous, that is where the analysis ends, as well. See, *e.g.*, *Business Guides, Inc.* v. *Chromatic Communications Enters, Inc.*, No. 89-1500, slip op. 7 (Feb. 26, 1991); *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1990); *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2502 (1990).

In any event, the legislative history confirms that "individuals are eligible for relief under the chapter [11]." S. Rep. No. 989, 95th Cong., 2d Sess. 3 (1978). Petitioner's attempt to reorganize is also consistent with Congress's preference, reflected in 11 U.S.C. 706(a) and 707(b) of the Bankruptcy Code, to encourage reorganizations rather than liquidations. In a liquidation proceeding under Chapter 7, petitioner's stock would have been sold, possibly at a distress price, and his unsecured creditors would have received only a token payment on their claims. Under the reorganization plan petitioner proposed in Chapter 11, the unsecured creditors were to receive the same cash payment on part of their claims; in addition, those creditors and petitioner were to share equally in the future income (if any) generated by petitioner's stock. In sum, the reorganization plan proposed benefits to petitioner and his creditors.

Petitioner's attempt to reorganize rather than liquidate should not be automatically foreclosed. Petitioner is eligible for Chapter 11 reorganization under 11 U.S.C. 109(d); that Section omits any requirement that debtors be engaged in an ongoing business. Petitioner's attempt to reorganize, like that of most business debtors, may not succeed. But the

Bankruptcy Code should not be construed to bar the attempt.

ARGUMENT

CHAPTER 11 REORGANIZATION IS AVAILABLE TO DEBTORS WITHOUT REGARD TO WHETHER THEY ARE ENGAGED IN AN ONGOING BUSINESS

The decision of the Eighth Circuit below rests on its earlier decision in *Wamsganz* v. *Boatmen's Bank of De Soto*, 804 F.2d 503, 505 (1986), which held that "persons who are not engaged in business may not seek relief under Chapter 11 of the Bankruptcy Code." The Eleventh Circuit in *In re Moog*, 774 F.2d 1073 (1985) (per curiam), reached the opposite conclusion, relying primarily upon the language of the Bankruptcy Code and its legislative history. *Id.* at 1074-1075. In our view, the Eleventh Circuit is correct. Section 109(d) of the Bankruptcy Code (11 U.S.C.) plainly authorizes individual debtors who are not engaged in an ongoing business to reorganize under Chapter 11. The legislative history supports this interpretation. The policy arguments that prompted the *Wamsganz* court to limit Chapter 11 relief to business debtors are flawed; even if they had some merit, they would not dictate restrictions on eligibility for bankruptcy relief beyond those enacted by Congress.

A. Section 109(d) Of The Bankruptcy Code Allows Debtors To Seek Relief Under Chapter 11 Without Regard To Whether They Are Engaged In An Ongoing Business

"As [the Court] ha[s] repeatedly noted, the starting point for interpreting a statute is the language of the statute itself." *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1990) (internal quota-

tion marks and citations omitted); see *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 110 S. Ct. 2126, 2130 (1990) (applying to Bankruptcy Code "the fundamental canon that statutory interpretation begins with the language of the statute itself"). "If the statute is clear and unambiguous, that is the end of the matter, for the court * * * must give effect to the unambiguously expressed intent of Congress." *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2502 (1990) (internal quotations and citations omitted); see *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, No. 89-1500, slip op. 7 (Feb. 26, 1991) (With a rule "[a]s with a statute, our inquiry is complete if we find the text * * * to be clear and unambiguous."); *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990). Courts "are not at liberty to create an exception"—or impose an additional requirement—"where Congress has declined to do so." *Hallstrom* v. *Tillamook County*, 110 S. Ct. at 309. To do so "creates too great a risk that the Court is exercising its own 'WILL instead of JUDGMENT,' with the consequence of 'substitut[ing] [its own] pleasure to that of the legislative body.' The Federalist No. 78, p. 469 (C. Rossiter ed. 1961) (A. Hamilton)." *Public Citizen* v. *United States Dep't of Justice*, 109 S. Ct. 2558, 2575 (1989) (Kennedy, J., dissenting).

The Bankruptcy Code identifies five types of bankruptcy proceedings, each assigned a different Chapter. Eligibility for relief under each Chapter is governed by Section 109 of the Code. Section 109(d) makes Chapter 11 reorganization available to all debtors who qualify for liquidation under Chapter 7, with the addition of railroads (which are excluded under Chapter 7), and with the express exception of

certain brokers.[4] In turn, Section 109(b) permits any "person" to apply for Chapter 7 relief except a railroad, insurance company, bank or other financial institution.[5] It is clear that both Chapter 11 reorganization and Chapter 7 liquidation are very broadly available remedies, subject only to a few, specifically enumerated limitations. A requirement that a debtor be engaged in an ongoing business is simply not one of them.

Comparing the wide availability of Chapter 11 reorganization (and Chapter 7 liquidation) with the more restrictive eligibility requirements for relief under Chapters 9, 12, and 13 of the Bankruptcy Code demonstrates that Congress spelled out limitations on access to particular forms of bankruptcy relief in the text of the Code itself. For example, only an insolvent municipality may seek relief under Chapter 9, "Adjustment of Debts of a Municipality."

---

[4] Section 109(d) provides: "Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under Chapter 11 of this title."

[5] Section 109(b) provides:

> A person may be a debtor under chapter 7 of this title only if such person is not—
>
> (1) a railroad;
>
> (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, credit union, or industrial bank or similar institution which is an insured bank or similar institution whch is an insured bank as defined by section 3(h) of the Federal Deposit Insurance Act * * *; or
>
> (3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, engaged in such business in the United States.

11 U.S.C. 109(c). "Only a family farmer with regular annual income may be a debtor under chapter 12." 11 U.S.C. 109(f). And "[o]nly an individual with regular income," unsecured debts of less than $100,000, and secured debts of less than $350,000, may proceed as a debtor under Chapter 13, "Adjustment of Debts of an Individual With Regular Income." 11 U.S.C. 109(e).

The case for judicial imposition of an "ongoing business" requirement on Section 109(d) presupposes a gross omission by Congress when it drafted the Bankruptcy Code. The contrary inference—that Congress enumerated whatever restrictions it intended on the availability of various remedies in the Bankruptcy Code itself—is more plausible. The reticulated limitations on eligibility for relief under Chapters 9, 12, and 13 provide convincing evidence that Congress would have excluded non-business debtors from Section 109(d) expressly if it had intended to do so. Cf. *e.g.*, *Omni Capital Int'l* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987); *INS* v. *Hector*, 479 U.S. 85, 89 (1986); *NLRB* v. *Action Automotive, Inc.*, 469 U.S. 490, 497 (1985).

B. The Legislative History Of The Bankruptcy Code Indicates That Chapter 11 Is Available To Individual Debtors Whether Or Not They Are Engaged In An Ongoing Business

When the language of a statute is clear, as it is in this case, courts should be chary of mining the legislative history for a contrary legislative intent. See, *e.g.*, *Dennis* v. *Higgins*, No. 89-1555 (Feb. 20, 1991), slip op. 5 n.4; *Mead Corp.* v. *Tilley*, 109 S. Ct. 2156, 2162 (1989); *Maine* v. *Thiboutot*, 448 U.S. 1, 6 n.4 (1980); *Greenwood* v. *United States*, 350 U.S. 366, 374 (1956). Reliance upon the express language of the statute is particularly important in

cases arising under the Bankruptcy Code, a highly technical, "detailed and calculated statutory scheme." *Lynch* v. *Johns-Manville Sales Corp.*, 710 F.2d 1194, 1198 (6th Cir. 1983); see *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989) (stating, in construing the Bankruptcy Code, that "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute").

In any event, the legislative history addressing the availability of Chapter 11 to non-business debtors supports the conclusion suggested by the language of Section 109(d)—that individual debtors may reorganize under Chapter 11 without regard to whether they are engaged in an ongoing business. The Senate Report expressly recognizes that non-business debtors "are eligible for relief under the chapter":

> Chapter 11, Reorganization is *primarily* designed for businesses, *although individuals are eligible for relief under the chapter.* The procedures of chapter 11, however, are sufficiently complex that they will be used only in a business case and not in the consumer context.

S. Rep. No. 989, 95th Cong., 2d Sess. 3 (1978) (emphasis added); see *In re Moog*, 774 F.2d at 1074.

The legislative history collected by the Eighth Circuit in *Wamsganz*, 804 F.2d at 505, merely reflects the anticipated function of Chapter 11 as a "single chapter for all business reorganizations," S. Rep. No. 989, *supra*, at 9, and Congress's expectation that the expense and complexity of Chapter 11 proceedings would generally discourage non-business debtors. Cf. *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2677 (1990). It does not embody a "clearly expressed legislative intention" to deny

Chapter 11 reorganization to non-business debtors. See, *e.g.*, *Dennis* v. *Higgins*, No. 89-1555, slip op. 5 n.4; *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987).

C. Allowing Individual, Non-Business Debtors To Reorganize Under Chapter 11 Furthers The Policy Of The Bankruptcy Code To Encourage Reorganization Rather Than Liquidation

The Bankruptcy Code provision permitting a debtor to convert a Chapter 7 case to one under Chapter 11 reflects Congress's preference for reorganization over liquidation. A debtor may convert his Chapter 7 case to a reorganization case under Chapter 11, 12, or 13 "at any time." 11 U.S.C. 706(a). "[T]his section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. * * * The policy of the provision is that the debtor should always be given the opportunity to repay his debts, and a waiver of the right to convert a case is unenforceable." S. Rep. No. 989, *supra*, at 94; accord H.R. Rep. No. 595, 95th Cong., 1st Sess. 380 (1977).

The policy favoring reorganization over liquidation is also manifest in Section 707(b). That Section authorizes the bankruptcy court to dismiss a Chapter 7 case if the debts are primarily consumer debts and the liquidation relief would constitute a "substantial abuse of the provisions of this chapter." In effect, Section 707(b) authorizes denial of liquidation relief in cases where the debtor can pay off a substantial part of his debts by reorganizing. See *In re Krohn*, 886 F.2d 123, 127 (6th Cir. 1989); *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989); *In re Kelly*, 841 F.2d 908, 914 (9th Cir. 1988).

Reorganization may be preferable not only for creditors, it can also produce a more desirable result than liquidation for the non-business debtor. In the case of *In re Moog*, 774 F.2d 1073 (11th Cir. 1985), for example, reorganization may have allowed the debtors to hold on to their family residence by offering to pledge future, non-business income. *Id.* at 1075. In this case, reorganization may enable the debtor to retain his only investment property.[6]

Indeed, petitioner's attempt to reorganize is consistent with the purposes of Chapter 11. Petitioner had but one asset: 400 shares of IEC stock. If this stock is worthless, as petitioner believed when he filed his Chapter 7 petitioner, a liquidation—which would discharge most of his prepetition debts and give him a "fresh start," S. Rep. No. 989, *supra*, at 3—was the logical course. Petitioner subsequently learned, however, that IEC had obtained exclusive licenses from the Federal Energy Regulatory Commission to build hydroelectric plants. In economic terms, IEC has an option to supply water power—an option that might generate significant income depending on future oil prices. It is true that IEC has not as yet generated earnings. But the $25,000 offer for petitioner's stock and the protest by a creditor that the offer was "woefully inadequate" indicate that the value of petitioner's share of IEC's future earnings could be substantial.

The future earnings represented by petitioner's IEC stock would be shared by petitioner and his creditors, however, only if he is allowed to reorganize under Chapter 11. In a liquidation proceeding under

---

[6] Where Chapter 11 relief is inappropriate, the case may be dismissed or converted to one under Chapter 7. See 11 U.S.C. 1112(b).

Chapter 7, the trustee is obligated to reduce the assets to cash for prompt distribution to claimants.[7] In a typical reorganization proceeding under Chapter 11, in contrast, the "debtor in possession" ordinarily retains control of the debtor's assets during the judicial proceedings.[8]

---

[7] Under Chapter 7, a trustee is appointed to assume control of the debtor's estate. 11 U.S.C. 701-704. The trustee will wind down the business of the debtor (if necessary), 11 U.S.C. 721, reduce the property of the estate to money "as expeditiously as is compatible with the best interests of the parties in interest," 11 U.S.C. 704(1), and distribute the proceeds to claimants according to the priorities established by the Code, 11 U.S.C. 726. For an individual (but not a corporation), the trustee's distribution will ordinarily result in a discharge of most of the debtor's debts. 11 U.S.C. 727(a), 727(a)(1); cf. 11 U.S.C. 523.

[8] 11 U.S.C. 1107. In contrast to the automatic appointment of a trustee in a liquidation case, a trustee will be appointed in a Chapter 11 proceeding only "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor * * * or * * * if such appointment is in the interest of creditors, any equity security holders, and other interests of the estate." 11 U.S.C. 1104(a). Under Chapter 11, a reorganization plan will typically be filed by the debtor; if the debtor fails to do so within the 120-day period prescribed by the Code, "[a]ny party in interest" may do so. 11 U.S.C. 1121. The plan must designate classes of claims, specify the manner in which the claims will be adjusted, and provide adequate means for its implementation. 11 U.S.C. 1123(a), 1124. After circulation of a disclosure statement, 11 U.S.C. 1125, and a hearing, 11 U.S.C. 1128, the court exercising bankruptcy jurisdiction may confirm the proposed reorganization plan if the criteria set forth in 11 U.S.C. 1129 are met. Among those criteria is the requirement that each impaired class of claimants must accept the plan or receive "property of a value * * * that is not less than the amount that such holder would receive * * * if the debtor were liquidated under chapter 7." 11 U.S.C. 1129(a)(7).

To be sure, Chapter 13 offers debt-adjustment proceedings that provide much of the relief available under Chapter 11, with streamlined procedures for the "adjustment of debts of an individual with regular income."[9] But Chapter 13's simplified procedures for individuals with regular income were not available to petitioner because he had no regular source of income and his debts exceeded the maximum amount permitted by statute. 11 U.S.C. 109(e). Significantly, Congress did not so limit eligibility to the more generally available reorganization relief under Chapter 11. Cf. *Gozlon-Peretz* v. *United States*, No. 89-7370 (Feb. 19, 1991), slip op. 9 ("[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2532 (1990) (same).

---

[9] The reorganization plan must be filed simultaneously with the petition or within 15 days thereof. Bankruptcy Rule 3015. The debtor must begin payments within 30 days of the filing of the plan. 11 U.S.C. 1326. Ordinarily, the payments under the plan must be completed in three years or less, although the court may extend this period to not more than five years "for cause." 11 U.S.C. 1322(c). In further contrast to a Chapter 11 case, there are no creditors' committees in Chapter 13. Cf. 11 U.S.C. 1102-1103. Whereas in Chapter 11, the debtor enjoys the exclusive right to propose a plan for a limited period of time, 11 U.S.C. 1121, only the debtor may file a plan in Chapter 13, 11 U.S.C. 1321. Unsecured creditors do not vote on the proposed plan; they may object to it or seek post-confirmation modification of the payment schedules. Compare 11 U.S.C. 1129, with 11 U.S.C. 1325, 1329. As in a Chapter 11 case, the Chapter 13 reorganization plan must allow unsecured creditors at least the same recovery as they would receive "if the estate of the debtor were liquidated under chapter 7." 11 U.S.C. 1325(a)(4).

In urging that petitioner's Chapter 11 case be reinstated, we do not offer any view as to whether petitioner's plan is viable—*i.e.*, that the proposed plan sets forth the requisite contents, 11 U.S.C. 1123, or that it should be confirmed, 11 U.S.C. 1129. Such speculation is simply not appropriate in the threshold determination whether petitioner is eligible to reorganize under Chapter 11.[10] The court of appeals' decision imposes an unlegislated barrier to non-business debtors seeking relief under Chapter 11, and an additional burden on the courts to shape the parameters of an "ongoing business" limitation on eligibility for that relief.[11] Deciding whether a Chapter 7 debtor is conducting an "ongoing business" would not be the only difficult inquiry confronting courts in bankruptcy cases, but it is one not required by Congress.

---

[10] If speculation that a class of debtors is unlikely to succeed were sufficient warrant to deny initial access to reorganization relief, then *no* debtor should be entitled to proceed under Chapter 11 because almost 90% of such reorganization attempts fail. Statistics indicate that 83% of cases filed under Chapter 11 do not result in a confirmed plan; of the 17% that do, only two-thirds of those cases (or 11% of the total) achieve successful reorganizations. E. Flynn, *A Statistical Analysis of Chapter 11* (Oct. 1989) (unpublished study conducted by the Bankruptcy Division of the Administrative Office of the United States Courts).

[11] The task appears to be particularly difficult, inasmuch as many "businesses" are operated by sole proprietors with "consumer" debts, and perhaps "consumer" assets, which can be significant. Herbert, *Consumer Chapter 11 Proceedings: Abuse or Alternative?*, 91 Com. L.J. 234, 234-35 (1986).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

STEPHEN J. MARZEN
Assistant to the Solicitor General

WILLIAM KANTER
BRUCE G. FORREST
Attorneys

MARTHA DAVIS
General Counsel

PATRICK TINKER
Attorney
Executive Office for
United States Trustees

MARCH 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20414